COURT OF APPEALS
DECISION
DATED AND FILED

March 17, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2867 **Cir. Ct. No. 2012CV12961**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

LNV CORPORATION,

PLAINTIFF-RESPONDENT,

V.

KEITH L. WILLOCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

Before Curley, P.J., Kessler, J. and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Keith L. Willock appeals a summary judgment of foreclosure granted to LNV Corporation. We affirm.

BACKGROUND

¶2 In March 2006, Willock signed an adjustable rate note for $193,000, secured by a mortgage on residential property. The lender was Ameriquest Mortgage Company. Ameriquest subsequently assigned the note and mortgage to Citigroup, which in turn assigned them to LNV, and both mortgage assignments were recorded on August 14, 2009.

¶3 Willock fell behind on his mortgage payments, and, on November 29, 2012, LNV brought a foreclosure action. Two weeks later, LNV filed an amended summons and complaint. In response to the amended pleadings, Willock, by counsel, filed an answer and affirmative defenses, and he requested mediation.

¶4 When mediation did not resolve the dispute, LNV moved for summary judgment, supporting the motion with the affidavit of Keith Manson. The affidavit reflects that Manson is authorized to act on behalf of LNV, and he goes on to describe the August 2009 assignments, to identify copies of the note, mortgage, assignments, and documents reflecting Willock's payment history that are all attached to the affidavit, and to aver that Willock "is due for the December 1, 2009 and subsequent payments" on the debt.

¶5 While the motion for summary judgment was pending, Willock retained new counsel. Successor counsel moved to amend the pleadings and submitted a proposed amended answer and affirmative defenses. LNV objected that the proposed amended pleadings were both untimely and inadequate to overcome the pending motion for summary judgment. Willock responded by filing a document styled as a "motion for judgment on the pleadings." LNV moved to strike that motion.

¶6 At the summary judgment hearing, Willock asked the trial court to accept his belatedly-filed amended answer and affirmative defenses. Further, he explained that he intended the "motion for judgment on the pleadings" to serve as a response in opposition to LNV's motion for summary judgment and as a request to grant Willock summary judgment instead. The trial court accepted Willock's amended answer and affirmative defenses, ruling that it would consider the amended pleadings along with the materials previously filed in deciding whether to grant summary judgment. The trial court also considered the original mortgage note and endorsements that LNV brought to the courtroom for the summary judgment proceeding. After hearing the parties' arguments, including arguments first raised by Willock in support of his "motion for judgment on the pleadings," the trial court granted summary judgment to LNV. Willock appeals.

ANALYSIS

¶7 We review summary judgments *de novo*, using the same methodology as the trial court. *See* ***PNC Bank, N.A. v. Bierbrauer***, 2013 WI App 11, ¶9, 346 Wis. 2d 1, 827 N.W.2d 124. That methodology is well-known and need not be repeated at length here. *See* ***Williamson v. Hi-Liter Graphics, LLC***, 2012 WI App 37, ¶4, 340 Wis. 2d 485, 811 N.W.2d 866. In brief, summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See* WIS. STAT. § 802.08(2) (2013-14).[1]

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶8 Willock begins by asserting that the trial court erroneously relied on the Manson affidavit to establish Willock's indebtedness and default. Willock argues that the Manson affidavit is hearsay that is not rendered admissible by the business records exception to the hearsay rule, WIS. STAT. § 908.03(6). We disagree.

¶9 WISCONSIN STAT. § 908.03(6) provides:

> RECORDS OF REGULARLY CONDUCTED ACTIVITY. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with s. 909.02(12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

§ 908.03(6).

¶10 In mounting a hearsay challenge to the Manson affidavit, Willock claims it fails to show that the affiant has necessary "personal knowledge regarding the LNV/Willock account." In support, Willock points to ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, 324 Wis. 2d 180, 781 N.W.2d 503. There, the successor holder of credit card debt submitted an affidavit regarding account statements prepared by the original creditor. *See* ***id.***, ¶¶2-3, 23. The ***Palisades*** court determined that the affidavit did not satisfy the business records exception set forth in WIS. STAT. § 908.03(6), because the affiant's statements did not demonstrate a basis for the affiant's knowledge of the practices of the original creditor. *See* ***Palisades***, 324 Wis. 2d 180, ¶23. As we subsequently explained, however, "***Palisades*** stands for the extremely narrow proposition that the hearsay exception for business records is not established when the only affiant concerning

the records in question lacks personal knowledge of how the records were made." ***Central Prairie Fin. LLC v. Yang***, 2013 WI App 82, ¶9, 348 Wis. 2d 583, 833 N.W.2d 866. The narrow holding of ***Palisades*** is not implicated here.

¶11 Manson avers that he is authorized to sign documents on behalf of LNV, that he is "familiar with" and "ha[s] access to the financial records concerning the mortgage which is the subject of the action," that he is "familiar with the facts surrounding this foreclosure and the subject account," and that, "in the regular performance of his job functions, [he] ha[s] personal knowledge of how the business records are prepared and maintained by LNV Corporation for the purpose of servicing mortgage loans." Moreover, Manson states that "it is the regular practice of LNV Corporation ... to make these records" and that they are made "at or near the time by, or from information provided by, persons with knowledge of the activity and transactions reflected in such records." Finally, the affidavit shows that Willock's payments are past due for a period beginning after LNV acquired the mortgage. In sum, Willock simply is not correct in asserting that Manson's affidavit fails to "remotely suggest that [Manson] has personal knowledge regarding the LNV/Willock account." We are satisfied that Manson's averments fully meet the requirements of WIS. STAT. § 908.06(3).

¶12 Willock also complains that the mortgage, mortgage note, endorsements, and assignments, as well as the customer activity statement offered with the Manson affidavit, are inadmissible hearsay. In support, he contends that Manson "is not a person who has personal knowledge" about the transactions at issue and that his affidavit is "insufficient to qualify the documents for admissibility under the hearsay rules," specifically, the business records exception in WIS. STAT. § 908.03(6). As we have just explained, however, Manson's affidavit does satisfy § 908.03(6). Moreover, the mortgage and note themselves

are not hearsay. *See* ***Bank of America NA v. Neis***, 2013 WI App 89, ¶49, 349 Wis. 2d 461, 835 N.W.2d 527 (citing extensive authority supporting the conclusion that mortgages, notes, assignments, and other contracts are not hearsay when they are offered for their legal effect).[2]

¶13 Willock next argues that the summons and complaint included an attached copy of the adjustable rate note "without endorsements.... [T]here were no properly endorsed signatures to challenge at the time of the commencement of the action.... The pleading did not allege endorsed notes, therefore, the burden of proof shifts to the LNV to prove the validity of the signatures." We agree with LNV's characterization of this argument as a red herring. A party may file an amended pleading once as a matter of course at any time within six months after the filing of the summons and complaint. *See* WIS. STAT. § 802.09(1). Here, LNV filed an amended summons and complaint within two weeks after commencing the action, and LNV attached copies of the endorsements to the amended complaint.

¶14 Willock next asserts that he "was entitled to have the original documents filed with the court on summary judgment or at trial," and he complains that LNV "has not supplied the court with any original documents." As

[2] In the reply brief, Willock insists that the mortgage and note constituted hearsay, notwithstanding governing Wisconsin case law holding that such documents are not hearsay when offered for their legal effect. *See* ***Bank of America NA v. Neis***, 2013 WI App 89, ¶49, 349 Wis. 2d 461, 835 N.W.2d 527. The contracts were hearsay in this case, he says, because LNV offered them "to show Willock had defaulted on the mortgage, not that it was simply a mortgage and/or mortgage note." This analysis is incorrect. An out-of-court statement may be excludable hearsay when it is offered to prove the truth of the matter asserted. *See* WIS. STAT. §§ 908.01(3), 908.02. Willock, however, does not identify anything in the mortgage or note stating that Willock defaulted on the mortgage. Thus, neither document was offered to prove the truth of any such statement. To be sure, LNV offered the documents to support its claim for foreclosure, but that does not render them hearsay. *Cf.* ***Neis***, 349 Wis. 2d 461, ¶49 (citations, italics, and brackets omitted) ("'When a suit is brought for breach of a written contract, no one would think to object that a writing offered as evidence of the contract is hearsay.'").

the record plainly reflects, however, LNV brought the original mortgage note and assignments to the courtroom for the summary judgment proceeding.[3]

¶15 Willock asserts next that the endorsements of the note from Ameriquest to Citigroup and from Citigroup to LNV do not satisfy the definition of "endorsement" found in WIS. STAT. § 403.204(1). The statute provides, in pertinent part, that "'[e]ndorsement' means a signature ... that alone or accompanied by other words is made on an instrument.... For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument." ***Id.*** Willock contends that the endorsements here are on "two free standing sheets." Building on this contention, he argues that the endorsements are therefore unenforceable because they are not "affixed to the instrument." *See* ***id.***

¶16 Willock fails to show that the endorsements are "freestanding" rather than affixed to the note. The trial court found that the note had one endorsement on the back of the document and a second endorsement on an allonge.[4] Willock makes no showing that the facts supporting these findings are subject to any genuine dispute. *See* ***Park Ave. Plaza v. City of Mequon***, 2008 WI App 39, ¶24, 308 Wis. 2d 439, 747 N.W.2d 703 (party must offer more than conclusory remarks

[3] The trial court expressly found that LNV brought the original note with endorsements to the courtroom for the summary judgment hearing. Although Willock's trial counsel asserted during the hearing that, in counsel's view, the note "looks like a copy," a party must offer more than conclusory remarks to defeat a motion for summary judgment. *See* ***Park Ave. Plaza v. City of Mequon***, 2008 WI App 39, ¶24, 308 Wis. 2d 439, 747 N.W.2d 703.

[4] "'An allonge is a slip of paper attached to a negotiable instrument for the purpose of receiving an endorsement.'" ***Neis***, 349 Wis. 2d 461, ¶7 n.6 (citations omitted).

to defeat a motion for summary judgment). Accordingly, we reject Willock's arguments bottomed on claims that the endorsements are "free standing."

¶17 Willock argues next that LNV is not the real party in interest for purposes of this litigation. He asserts that "LNV must prove on summary judgment that interest in the debt was legally transferred to it" by the original mortgagee and its successor. Further, and relatedly, he contends that "LNV has not proven the [m]ortgage and [m]ortgage [n]ote were properly endorsed and transferred and until [LNV] does so, ownership remains with Ameriquest or Citigroup." A Wisconsin bankruptcy court decision persuades us that Willock cannot defeat summary judgment with these arguments. *See* ***Edwards v. Deutsche Bank Trust Co. (In re Edwards)***, 2011 WL 6754073 (Bankr. E.D. Wis. 2011).

¶18 First, ***Edwards*** explains why Willock lacks standing to challenge the assignments to Citigroup and LNV:

> In Wisconsin, a party lacks standing to bring a contract claim if it is neither a party to nor a third party beneficiary of the subject contract. *See* ***Schilling v. Employers Mut. Cas. Co.***, 212 Wis. 2d 878, 886, 569 N.W.2d 776 (Ct. App. 1997) (only a party or third-party beneficiary has standing to raise a contract claim). The person claiming third party beneficiary status must show that the contracting parties entered into the agreement for the direct and primary benefit of the third party, either specifically or as a member of a class intended to benefit from the contract. *See* ***id.*** at 886-87, 569 N.W.2d at 780. An indirect benefit incidental to the primary purpose of the contract is insufficient to confer third party beneficiary status. *See* ***id.*** at 887, 569 N.W.2d at 780. The debtor was neither a party to the ... agreements nor a potential third party beneficiary of those agreements, so his standing to challenge the assignments is lacking.

Edwards, 2011 WL 6754073 at *4. Willock was neither a party to nor a beneficiary of the assignments to Citigroup and LNV, and therefore, like the debtor in ***Edwards***, he lacks standing to challenge the assignments.

¶19 Second, Willock cannot challenge the validity of the endorsements:

> Wisconsin's Commercial Code presumes the authenticity of the signatures on the [n]ote and the authority to make them.... "*[T]he signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer*...." Wis. Stats. § 403.308(1) (emphasis added).... [T]his is not an action to enforce the liability of the persons endorsing the instrument. Therefore, the authenticity of their signatures is properly presumed and is not subject to challenge by the debtor.

Edwards, 2011 WL 6754073 at *6 (some formatting omitted, one set of quotation marks added). Similarly, the instant case is not an action to enforce the liability of persons who endorsed the note. Willock's effort to challenge the endorsers' signatures thus fails to raise a question of material fact.

¶20 Willock next seeks to avoid summary judgment on the ground that "LNV has submitted altered documents on summary judgment." Willock presents this argument in four sentences unaccompanied by a citation to any supporting legal authority. We conclude that the issue is inadequately briefed and we decline to consider it. *See* ***Vesely v. Security First Nat'l Bank of Sheboygan Trust Dept.***, 128 Wis. 2d 246, 254 n.5, 381 N.W.2d 593 (Ct. App. 1985).

¶21 Willock also maintains that he has a potential claim under the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2605(b)-(c), because, he alleges, he did not receive notice within fifteen days of the transfer of the servicing of his loan. He asserts that "Ameriquest, Citigroup and LNV are all complicit in violating RESPA rules in this case." Willock goes on to dispute LNV's contention

that a federal statute of limitations would bar his potential RESPA claim.[5] We conclude that the dispute is immaterial. Willock did not file a counterclaim in these proceedings, and he does not cite any authority to support his implicit contention that unfiled counterclaims provide a basis for defeating summary judgment. Accordingly, we will not consider the viability of Willock's inchoate RESPA counterclaim.[6]

¶22 In sum, LNV presented material evidentiary facts showing that Willock owes money on his mortgage debt and has failed to pay. As LNV correctly explains, when a litigant faces a summary judgment motion that is supported as required by WIS. STAT. § 802.08(2), "[t]he opponent's obligation is to counter with evidentiary materials demonstrating there is a dispute." *See* ***Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.***, 2001WI App 148, ¶48, 246 Wis. 2d 933, 632 N.W.2d 59, *aff'd*, 2002 WI 80, 254 Wis. 2d 77, 646 N.W.2d 777. Willock identifies nothing in the record to show that material facts are in dispute.

[5] Willock complains that LNV did not raise arguments about the viability of a RESPA claim during the trial court proceedings. In his view, the arguments on this issue that LNV presents now must therefore "fall on death [sic] ears." To the extent this contention suggests that a respondent must raise arguments in the trial court before presenting them to this court, Willock is wrong. A respondent "may raise any defense to an appeal even if that defense is inconsistent with the stand taken at trial." ***State v. Baeza***, 156 Wis. 2d 651, 657-58, 457 N.W.2d 522 (Ct. App. 1990).

[6] Willock cites numerous Wisconsin statutes of limitation in his reply brief, and he implies that he could bring counterclaims alleging fraudulent transfers and perhaps breach of contract within the time limits those statutes prescribe. We do not consider arguments presented for the first time in a reply brief. ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661.

We are persuaded that the trial court correctly assessed Willock's arguments: "there really is nothing here."

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.